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# WILL WE HAVE INDUSTRIAL WAR OR PEACE WITH THE TAFT-HARTLEY LAW?

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The question raised by the title of this paper—*Will We Have Industrial War Or Peace With The Taft-Hartley Law?*—cannot be answered categorically.

Great sums of money are being spent by powerful economic forces in America in spreading propaganda seeking to convince the many millions of American people who have never read the Taft-Hartley law and who cannot be expected to understand in lawyer terms the implications of its multitudinous legal technicalities that the law has already reduced industrial strife. Much of this propaganda comes from the same anti-union sources that had so much to do with whipping up public opinion to such a state of hysteria as came to characterize the view of so many Americans before the Taft-Hartley law was passed.

Fortunately, a law of diminishing returns applies not only to the field of economics but to the field of human and mass psychology. It is becoming more and more difficult for the antilabor forces of the country to hold their Taft-Hartley law converts. American public opinion is steadily shifting to one of grave doubt as to the workability, feasibility, fairness, and, in some respects, constitutionality of the Taft-Hartley law.

Reflection upon the rights of labor is taking the place of resentment over the abuses of labor which came to dominate public opinion prior to the passage of the Taft-Hartley law. The political pressures which were brought to bear upon the Congress during the weeks of the historic debate over the Taft-Hartley bill in the first session of the 80th Congress made it very difficult to direct the attention of many members of Congress to an analytical consideration of the merits and demerits of various sections and provisions of the proposed labor legislation. There was a great tendency for many members of Congress, responding to what they thought was a public demand to discipline labor, to align themselves behind certain leaders of Congress who had become the spokesmen for those few groups within American industry who saw an opportunity to pass very drastic labor legislation. Proponents of the legitimate rights of labor during that debate

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were somewhat on the defensive because intellectual honesty compelled us to admit that labor had, in some particulars, abused its privileges and exceeded its rights by infringing upon the liberties of others.

When the 80th Congress convened in January 1947, organized labor in America as operating outside of the framework of a friendly public opinion. Those who were willing to read the handwriting on the wall could not fail to see that some restrictive labor legislation was needed and that some would be passed by the 80th Congress. Some of us in Congress warned labor in January 1947, and repeated our warnings in the weeks following, that there was a great danger that some of the legitimate rights of labor would be jeopardized by Congressional action unless the labor leaders of the country came forward and cooperated with the Congress in preparing legislation which would satisfy the public demand for an end to the unfair labor practices of the unions but which legislation, at the same time, would not injure or destroy any of the legitimate rights of labor. Unfortunately, labor leaders, as a group, said "no" to any suggestion that they help prepare fair labor legislation. They apparently, but mistakenly, thought that the legislative processes of our democracy could not and would not be applied to labor. Subsequent events proved how mistaken they were.

Although public opinion is rapidly shifting to a recognition that the Taft-Hartley law is too extreme in many of its provisions, labor needs to heed the caution that many people who were supporters of what they thought were good objectives of the Taft-Hartley bill, and which they now realize cannot be accomplished in many respects through the Taft-Hartley law are nevertheless hopeful that the passage of the law will at least demonstrate to American labor that it must work within the framework of public opinion. It is public opinion which is the basic check upon the activities of all groups within our system of self-government. Labor must never forget that fact.

American workers also need to reflect as they never have before on the basic meanings of our system of political and economic democracy. They, as well as Americans in all walks of life, need to rededicate themselves in these trying days to the principles of our private property economy. Labor needs to recognize that in spite of the provocations and propaganda of antilabor forces in this country which succeeded in whipping up public opinion, including that of the majority opinion of the Congress of the United States, to such an emotional state that the Taft-Hartley law was passed, we still have available to us the democratic procedures of self-government which can and must be used to correct such wrongs. There are not very many places in the world where labor is still free to participate in

the rights of democratic self-government, including the freedom of the ballot box. Hence, American labor should remember that it can best strengthen its position with American public opinion if it will confine its program for a thorough overhauling of the Taft-Hartley law to the democratic procedures available to it through legal tests in the court rooms of American and political tests at the voting booths of America.

We cannot condone a defiance or evasion of the law even though it may be an unpopular law. Once laws are put on the statute books, be they the Taft-Hartley law or any other, we cannot condone discriminatory practices in the enforcement of the law and still keep faith with government by law.

On the other hand it is proper and right for labor to select certain fact situations in the form of specific labor disputes in order to challenge and test the legality of some of the major sections of the Taft-Hartley law. Some sections of the law, in all probability, will be declared invalid by the courts, but most lawyers agree that labor, as well as the public, soon will come to recognize that the injustices and unfair provisions of the Taft-Hartley law cannot be corrected by court decisions. Only those parts of the law which violate the Constitution, or which might be found to be so involved in a maze of ambiguities and inconsistencies as to be void, can be eliminated by court action.

One of the worst evils of the Taft-Hartley law is that most of its unjust provisions are so cleverly devised from a legalistic standpoint that no relief will be provided labor from most court tests of the law. The lawyers for antilabor employers will be able to delay and delay the consideration of labor's demands under this law for so long that they will accomplish their real intent which is to use costly court actions to harass and defeat unionism. The best way to protect the legitimate interest of labor under this bad law is not in the courts but at the ballot boxes, by electing men who will repeal it or rewrite it.

The American people fully understand that this law must and will be tested in the courts and they understand that to make those tests there will be instances in which a union will decide to violate some section of the law in order to test it. But that is quite a different thing from any concerted program on the part of labor generally to refuse to abide by the law.

The litigation and court tests which will flow from this law should remove any fear of economic insecurity from law school students who plan to specialize in labor law as long as this full employment bill for lawyers remains on the statute books. In a facetious vein it might be said that the legal profession operating as the tightest closed shop union in America produced the Taft-Hartley law as part of its make-work program.

The Taft-Hartley law is subject to the criticism that it is a hodgepodge of legal technicalities so cleverly devised as to weaken the bargaining strength of unions. Throughout the debate on the Taft-Hartley law politician after politician in the Congress sought to make clear for the record that he was not opposed to unions. However, as one listened to the arguments of any of the self-confessed friends of unions who announced that they were voting for the Taft-Hartley bill the impression grew that these professed friends of unions were in many cases strong for weak unions.

Many, many people seem to forget this curious fact: Throughout the long history of the labor movement in this country every demand made by the nation's workers has met with consistent and often violent opposition. Then, after each gain had been won, historians and people generally looked back and agreed that labor's so-called "demands" were just and necessary.

Go back as far as you like, the story is always the same. Even labor's long fight for free education was bitterly denounced. As for the right to organize and bargain collectively, there is still a powerful minority of union-hating employers who want no part of it. Unfortunately their attitude is reflected in some sections of the Taft-Hartley law.

It should be noted and not forgotten that collective bargaining now plays a vital part in our economy. Today some 50,000 union contracts protect the wages and living standards of 15 million workers and their families. The arithmetic of these contracts is part of the arithmetic of democracy.

To understand the great differences that developed in the Congress of the United States over the many issues that are involved in the Taft-Hartley law would require a painstaking analysis of the voluminous record which was made during the weeks of committee hearings and the many days of carefully prepared debate on the bill. The debate was an historic one—particularly in the Senate where the privilege of full debate still prevails.

It should be mentioned that during the debate on the President's veto message handed down on the Taft-Hartley bill an attempt was made to stifle full debate on that veto message by the leaders of the majority who seemed to fear that there was a danger that they might lose their majority following, if the members of the Senate and if the people of the country were given sufficient time to reflect upon the soundness of the President's veto message. Fortunately, there were enough members of the Senate who dared to challenge the steam-roller tactics of the majority by exercising their right to hold the floor until ample time could be guaranteed to the minority to make its case in support of the veto. As the writer of this paper pointed out in that debate the Senate of the United States is the last great

citadel of untrammelled free speech among the parliamentary bodies of the world and the interests of democratic government make it imperative that it remain such.

The Congressional debates on the Taft-Hartley bill provide source material for several good doctorate theses in both law and political science including one on the subject "Parliamentary Strategy—Its Use and Abuse in the Senate of the United States."

Time and space, as well as the endurance of the reader, do not permit this paper to cover within its subject matter even a broad outline of the many issues and points of view that were developed and expounded throughout the Congressional history of the Taft-Hartley bill. However, a few of the high-lights will be discussed briefly in presenting the writer's view that the Taft-Hartley law unless drastically revised will mean industrial war rather than industrial peace in the years to come.

It is true that some aspirants for the Presidency of the United States, who find themselves committed to the Taft-Hartley law, are attempting to save political face by selling a *non sequitur* to the American people. Such demagoguery is not new in American politics but follows the old tested formula that "partisanship often blinds the partisan to the truth."

Thus, the politicians who voted for the Taft-Hartley bill and who are now confronted with the task of proving to labor that they knew what was best for labor, *à la* the Taft-Hartley bill, are defending their vote by pointing out that there have been fewer strikes since the Taft-Hartley bill was passed than there were during a similar period before it was passed. Oh, Aristotle, what fallacies are committed in thy memory!

Official government labor statistics show also that during the period following the passage of the Taft-Hartley law national employment has increased. Surely the proponents of the Taft-Hartley law must be able to find some cause to effect relationship between the law and increased employment. It is no less a *non sequitur* to argue that because there have been fewer strikes since the passage of the Taft-Hartley law than there were for a similar period before its passage the Taft-Hartley law is the cause of the decrease in strikes.

It also is to be noted that the level of the cost of living has risen considerably since the passage of the law in spite of the flurry of recession in recent days. Surely the fact that the two phenomena have occurred in a close time relationship to each other must establish and bear out a causal relationship if we are to follow the logic, or lack of it, of the proponents of the Taft-Hartley law in respect to strike statistics.

Of course, when it is pointed out to the proponents of the Taft-Hartley law, who now are attempting to rationalize their votes on the basis of the decline in strikes since the passage of the law, that thousands upon thousands of American employers entered into evasive and subterfuge agreements with labor in order to get around the provisions of the law and avoid conflict with the workers over the act, their response is chiefly characterized by extra vocalization that doesn't even formulate itself into words.

When it is pointed out to these defenders of the Taft-Hartley law that there would have been strikes in the major industries of this country, whose labor contracts terminated after the passage of the Taft-Hartley law, if management in those industries had not yielded to the major economic demands of the unions in order to avoid a test under the Taft-Hartley law, these defenders of the Taft-Hartley law have a common reply, namely, "we just don't believe it." However, all they need to do is to talk to a cross-section of employers who have signed labor agreements since the passage of the Taft-Hartley law. They will find that employer after employer will tell them, if they win his confidence, that he made many concessions which he is sure he would not have needed to make if he had not considered it so very desirable that he avoid a test with his union over the Taft-Hartley law.

Until courts pass upon various provisions of the act it cannot be said within a certainty just how far the parties to a labor agreement can go in contracting out from under the provisions of the act. However, there is no doubt about the fact that thousands of labor contracts have been entered into since the passage of the act which cannot be reconciled with the spirit and intent of Congress in passing the act. It certainly is clear that in passing the act Congress had no intention of passing a so-called private act but rather the putting upon the statute books a public policy act frequently referred to throughout the debate as a union control law.

Professor Edwin E. Witte, of the University of Wisconsin, and one of the top labor economists of the country comments upon the doubtful legal status of the many labor agreements which seek to exclude by agreement of the parties the application of the Taft-Hartley law to the terms of the agreement as follows:

"An illustration of the present uncertainty surrounding the new law is afforded by the public statements which the two members of Congress whose names this measure bears made concerning the agreement concluded recently between John L. Lewis' United Mine Workers and the bituminous coal operators of the country. Congressman Hartley de-

nounced this agreement as 'a clear violation of the labor law' and warned the operators that they faced criminal prosecution and heavy penalties if they observed the provisions of the agreement. Senator Taft thereafter gave it as his view that the coal agreement was not 'in any way a violation of the law'; and going beyond this, he cited the agreement as illustrating that under the new law 'employers and employees should be able to make any contract they want to.'<sup>1</sup>

In the same article Professor Witte writes:

"What has been most disturbing to managements sincerely desirous of maintaining or developing better relations with their unions has been the bitterness the new law has aroused among the leaders of union labor and the staunch union members. It has opened old sores of extreme distrust of 'business' which had been pretty well healed. It also has confronted managements with the prospect of having to find a solution before long for difficult problems of labor-management relations arising out of the new law. Looming large among these are the union insistence upon eliminating 'no-strike' clauses in contracts and the problem of what to do when union-security provisions expire. In this connection it is worthy of note that most of those management witnesses who in their testimony in the Congressional hearings strongly condemned the closed shop never had such a provision in their contracts."<sup>2</sup>

Then, too, there have been those employers who since the passage of the law have signed agreements without much collective bargaining controversy because they have been very anxious to grant substantial increases in wages for a variety of reasons such as their desire to maintain an inflated price structure out of which they are reaping, at the expense of a long suffering public, excessive profits. Such employers have followed the course of avoiding any stoppage of work by going along with labor for the most part, even though it has meant substantial increase in wages because they know the pattern of American industry since the end of the war has been to increase prices, at least twice the amount necessary, to take care of any increase in wages. In many instances the increase in prices has been several times the amount necessary to pay for increased cost of labor. However, by granting a wage increase they have been able to pass along to the consumer greater than necessary price increases under the half truth that increased labor costs require it.

Then there have been other employers who have followed the advice of certain employer and trade associations that now is not the time to challenge

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<sup>1</sup>Witte, *Labor Management Relations Under the Taft-Hartley Act*, 25 HARV. BUS. REV. 554 (1947).

<sup>2</sup>*Id.* at 573.



labor under the Taft-Hartley law. This antilabor group of employers, who fortunately, at least at present, represent a minority of American industry are adopting the strategy of acceding to the major demands of labor for the time being until they can feed public opinion with another prescription of "propaganda opiates" which will becloud the public into thinking that maybe after all the Taft-Hartley law is good for labor.

This group of employers is well trained in industrial warfare and appreciates the fact that the timing of a battle often means the difference between victory and defeat. They know that their battle against strong unionism by use of the legal weapons provided in the Taft-Hartley law can more easily be won in time of declining employment rather than in a period of expanding employment such as still characterizes the American post war economy. The truth is that it is going to take two or three years for the Taft-Hartley law to show its legal effects and it is to be expected as long as full employment exists and labor's economic demands are generally complied with there will be few strikes resulting from the provisions of the Taft-Hartley law.

However, when recession starts in with its inevitable resulting unemployment the labor relations picture will change and then the opportunity will present itself under the provisions of the Taft-Hartley law for those employers who wish to take advantage of organized labor to do so. Then industrial conflicts will move from the arena of a few court test cases which are presently being carried on to the arena of economic industrial warfare. Labor will be at a disadvantage at first in that struggle but as always it will learn the hard way and in due course of time another legislative record in defense of the legitimate rights of free workers will be written into the statute books of America as was the case when the battles of the Norris-LaGuardia Act and of the Wagner Act were won. Be that as it may, the fact remains that statesmanship has a great opportunity to help avoid that potential industrial war by proceeding now to revise in many major respects the Taft-Hartley law.

Perhaps as clear a bird's eye view as can be obtained of the great difference between the proponents and the opponents of the Taft-Hartley bill, both as to legal substance and parliamentary strategy, can be presented in this paper by calling attention to the differences which were brought out in some of the speeches in the closing hour of the historic debate in the Senate.

During that hour the junior Senator from New York, Mr. Ives, summarized his position in support of the bill and in part he said:

"Mr. President, when the conference bill was before this body on the day on which it was finally passed by the Senate, I expressed myself rather thoroughly concerning it. It is not my purpose at this time to repeat to any great extent what I said then.

"However, the veto message accompanying the President's disapproval, as I see it, was utterly extreme, extreme in an uncalled-for manner, extreme in a sense which leaves no room by which there is a possibility to get together. Therefore, in the face of that veto message, I should like to make further comment.

"As I said at that time, and I repeat now, this is not a perfect bill. No one knows that better than I do. However, I want to point out one very important thing, and that is that in all probability this is as near perfection, insofar as legislation of this nature is concerned, as we can hope to reach at this particular time in the Congress of the United States. It probably reflects more completely the composite thinking of the Congress of the United States at this time than would any other piece of legislation dealing with this subject. . . .

"So when the President comes forth and, as was pointed out by the Senator from Minnesota (Mr. Ball), has nothing favorable to say about any part of the legislation, it causes one to pause, because I happen to know very definitely that most parts of this measure are very good indeed. It is not as bad as it has been pictured to be in the veto message. The message contains exaggeration after exaggeration. The worst possible interpretation again and again is placed upon the bill's provisions. Then it is inferred it is to be subjected, finally, to the worst possible type of administration that any act of this nature could possibly have. Of course, if that were the case, we would have chaos; but that is not the case. The bill, with sympathetic sincere administration, can be made to work, and it can be made to work without any injury whatever to the legitimate objectives of organized labor. In fact, administered properly, the bill can strengthen organized labor, and I want to see organized labor strengthened.

"The attitude of the President, the attitude of the critics of the legislation causes me to wonder: Is there going to be a definite attempt to sabotage this legislation if it is enacted? I come to the point which I think is one of the three most important in connection with the bill, namely, Will the National Labor Relations Board, and the administration under that Board, seek to sabotage the legislation? I do not believe so. I have faith in the Chairman of that Board. He may not agree with the bill, he may not like it, but he is the type of man who will do his utmost to see that its provisions are carried out faithfully. . . .

"Finally, and most important of all, is the question of the joint congressional committee which has been referred to in the discussion today. Too little attention has been paid to the importance of that joint committee. However, I think its significance is now beginning to be realized. The joint committee itself, through its own operations and activities,

can pave the way for the removal of any undesirable situation which may develop as a result of this legislation. . . .

"As I stated in my remarks two weeks ago, this bill is not an end product. This is not final legislation on this subject. That was the mistake which has been made in connection with the National Labor Relations Act, when it was first passed, and ever since. This type of legislation is subject to constant change and correction. If it were perfect today, 5 years from today many imperfections would very likely have shown up, in view of intervening circumstances. There can be no end product, no final legislation, in this field.

"With that understanding, the joint congressional committee can go forward, looking for corrections which must be made, and helping management and labor to get together and to work together. These things they can do, and I know it. The joint committee should act in part to help formulate administrative policy and procedure as well as to perform its functions as a strictly legislative agency at the inception of the new law. These things the committee can do, and I know it.

"If the committee will go forward with the idea of helping to get labor and management together, the idea of correcting the defects in the legislation, and, finally, the idea of having a law which is absolutely fair and as nearly perfect as possible, then I predict that the bill passed today—as I believe it will be—will prove to be of great benefit to the country."<sup>3</sup>

The junior Senator from New York summarized very well the opinion of a great majority of the proponents of the Taft-Hartley bill who made the same argument so common in the press at the time that the Taft-Hartley law should be passed, imperfect as it was, but with the hope and the promise that it might be amended later.

It is submitted that such an argument in justification of voting for legislation which admittedly is in need of amendment at the very time it is passed is not a sound one on which to support a vote for the legislation. Thus the writer of this paper replied to the summary arguments of the proponents of the bill in part as follows:

"Let me make a point or two with regard to the merits of the great issue now before us. I have just listened to two very interesting and able speeches—one by my good friend from Minnesota (Mr. Ball) and the other by my good friend from New York (Mr. Ives).

"I think these two distinguished Senators have overlooked one very fundamental point in drafting legislation, and that is that if legislation contains language which permits of abuse of power, it is bad legislation. To say that they believe that extreme interpretations have been placed

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<sup>3</sup>93 CONG. REC. 7683 (June 23, 1947).

on the legislation by the President and by some of us who have opposed the legislation on the floor of the Senate is to overlook the point that what the President has been pointing out, and what we have been pointing out, is that the language of the bill would permit abuse of power. It is subject to the interpretation we have put on it and party litigants under it will be entitled to those interpretations as a matter of legal right. This law will not and cannot, under its legal meaning, be interpreted and administered to please the Senator from Minnesota and the Senator from New York. It must be given its legal meaning by the courts, and I say that the courts are bound to apply it quite differently from the way Senator Ives and Senator Ball talk about it.

"To try to alibi it, or rationalize it on the ground that if it is properly administered it will not be as bad as we think it will be, begs the whole question. The Senator from Minnesota (Mr. Ball) and the Senator from New York (Mr. Ives) cannot take away from the courts of this land their solemn obligation to give the legal meaning to the language used in this bill as the law requires. Employers will be entitled to decisions under it which, according to the language of the bill, will enable them to destroy many legitimate rights of labor. . . .

"The courts are bound to apply the language of this bill in accordance with its legal meaning; and when they do, many hardships will be imposed not only upon organized labor in this country but upon employers as well. It is a legal monstrosity which will cause much litigation and resulting labor strife.

"The second point I would make on their speeches is that running through them is the tacit admission that before this bill is finally passed they recognize that it contains a great many imperfections. . . . I say statesmanship calls upon us now to prevent the passage of legislation which even the sponsors themselves will admit contains many imperfections. These sponsors are engaging already in a confession and avoidance plea.

"The last point I want to make is one in regard to Senator Ives' talk about sabotaging the bill. I do not know what he meant by sabotage, but, as I said on Saturday, if this bill goes on the books the junior Senator from Oregon will take the position that the forces of government must be used to carry out and enforce the bill. There cannot be government by law in this country on any other basis. But our insistence upon enforcement of the law is not going to change human nature. I am very much of the opinion that labor, recognizing the tremendous injury that this bill will inflict upon its legitimate rights, will dig in along a united front and fight the administration of this bill to the extent that it visits upon labor gross injustices.

"Will that produce industrial harmony in America? Will that give us the peace in industry that we want? Not at all, Mr. President. We shall not be able to escape the fact that before this bill is even dry on the statute books we shall have to proceed at once to work out sub-

stantial revisions of it. Why not do it now? Why not recognize the duty of statesmanship which rests upon each and every one of us and sustain this veto and then proceed, as was pointed out by another speaker this morning, the very able statesman from Wyoming (Mr. O'Mahoney) to work on a bill that will meet the objections which have been raised to this bill? I think that is the solemn duty of each one of us in this session of Congress. I shall not vote, Mr. President, for a bill which the proponents already recognize is one which should be started down the road of revision.

"Mr. President, I do not believe that an issue more vital to the economic welfare and the over-all public interest of this country will be before the Members of this body for many a day. I am sure that at the hour of 3 o'clock this afternoon every man in this body will have an opportunity to make his record as to whether he will vote to protect the public interest or will vote for a bill so prejudiced in its terms that it will invite and invoke great industrial disharmony for years to come until the injustices of the bill are wiped once and for all off the statute books of America? I shall be glad to stand on my record of consistent opposition to this bill and in support of the President's excellent and unanswerable veto message."<sup>4</sup>

Although the Congress passed the Taft-Hartley law over the President's veto on June 23, 1947, serious doubts as to the wisdom of some effects of the bill were expressed in Senate speeches within a few days after the act became law, by members of Congress who voted for the bill. Doubts were expressed as to whether or not the sections of the bill restricting political activity by unions were constitutional, or were so ambiguous in phraseology as to place unions in a position of acting at their peril in opposition to or in support of political candidates.

Some members of Congress who voted for the bill found themselves in disagreement as to the legality of the Communist affidavit section of the bill, and as to the procedure which was required under the law in regard to union registration requirements and the public's right to inspect the information filed by the unions. The Secretary of Labor gave one interpretation to the effect that such information was to be treated as confidential, available only to the Secretary of Labor and the National Labor Relations Board; while on the other hand some of the leading proponents of the act made public comment to the effect that the ruling of the Secretary of Labor was in clear violation of the intent of Congress as expressed in the language of the act. To all this the Secretary of Labor replied it was for the courts to decide—all of which caused the lawyers to take note!

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<sup>4</sup>93 CONG. REC. 7685 (June 23, 1947).

By July 14 the senior Senator from New Mexico, Mr. Hatch, and the senior Senator from Vermont, Mr. Aiken, both proponents of the Taft-Hartley bill, had become convinced that the political expenditure section of the bill seeking to regulate the political activities of unions was unconstitutional. Therefore on that day they made speeches in the Senate in explanation of an amendment which they had introduced several days previously, and which still is pending in the Senate, seeking to correct what they considered to be an unconstitutional section of the law.

Some of the remarks of the Senator from New Mexico on that occasion are as clear a rationale of the position taken by many of the proponents of the Taft-Hartley law as is to be found in the entire debates. He said in part:

"Mr. President, because I have been asked several questions, I shall digress for a moment and shall discuss another subject. When the Taft-Hartley bill was before the Senate, I thought all of us knew it was not a perfect bill. The question of labor-management relations is too great, too involved, and too complex to be solved by one or even a series of legislative acts, if it is possible to solve those problems by legislation at all.

"Nevertheless, many of us believed that notwithstanding those apparent defects, the Taft-Hartley bill contained much worthwhile legislation, sufficient to require its passage. Even when the conference report was discussed on the floor and when one of the more objectionable features was plainly pointed out, the thought continued with some of us that corrections could be made by subsequent legislation and that it would be better to pass that measure and let it become the law, notwithstanding the defects. I, myself, was of that mind, but I made it plain that whenever an injustice or wrong appeared I would sponsor legislation to correct it.

"Accordingly, last week I was glad to join with the Senator from Vermont (Mr. Aiken) in submitting to the Taft-Hartley law an amendment which we believe will correct at least one wrong and error which was contained in the original act. The amendment we offer merely strikes out the word 'expenditures' from what was first section 304 of the House bill, and was later incorporated into the legislation finally drawn up by the conferees representing the two houses. The bill which passed the Senate did not contain that provision. So far as the Senate is concerned, that provision appeared in the Senate only when the conference report was submitted to it.

"By including the word 'expenditures,' it was sought to place expenditures on the same basis as contributions, and to apply both of those terms to both corporations and labor organizations. At first glance, that provision would seem to be a fair one; it would seem to be fair to place corporations and labor organizations upon the same basis.

However, it is this provision including the word 'expenditures' which caused considerable debate in the Senate, and it was claimed that the provision violates certain constitutional guaranties of freedom of speech and freedom of the press.

"As I have said, there was some discussion of this provision at the time when the conference report was being considered, but it must be remembered that in the consideration of a conference report no opportunity for vote on separate provisions is given and the only vote possible is to either adopt or reject the conference report. Therefore, Senators never had an opportunity to express themselves on the inclusion of the word 'expenditures' in the general restrictions against political contributions.

"The amendment the Senator from Vermont and I have offered will give an opportunity to vote on the exact question and the precise issue. This is one of my reasons in offering the amendment. If at all possible, it should be reported by the committee and discussed and acted upon before the present session adjourns.

"I am not discussing the constitutional aspect of the situation. Regardless of that, it appeared to me at the time the conference report was being discussed that including the word 'expenditures' did unfairly discriminate against labor organizations. It was a defect, however, which I believed could be corrected by later legislation, and therefore, I am glad to sponsor an amendment which will give the opportunity to make what I concede to be a needed correction."<sup>5</sup>

In the same vein the Senator from Vermont, Mr. Aiken, argued:

"I think it is entirely possible that the labor leaders may be inviting a test which they feel they are almost certain to win, because there is not the slightest shadow of a doubt that this rider on the labor bill, which was adopted in the conference committee, is a direct violation of the right of free speech, and the right of a free press.

"I wish to join the Senator from New Mexico at this time in urging that action be taken to correct, at the earliest possible date, this bit of foolish legislation on the part of Congress. I understand that if interpreted literally, as a law should be interpreted, most of the newspapers of the country would be violating the law if they commented on political issues during political campaigns. Certainly there are many organizations, some on one side of an issue and some on another, which are incorporated, which would be strictly prohibited from spending a single penny to distribute voting records of Members of Congress, or even commenting on issues in a political campaign."<sup>6</sup>

To illustrate that good feeling and good humor prevailed at least most of

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<sup>5</sup>93 CONG. REC. 9004 (July 14, 1947).

<sup>6</sup>93 CONG. REC. 9005 (July 14, 1947).

the time in the Senate throughout the course of the debate over this labor legislation, even though the differences in opinion were chasm-wide and deep, the following colloquy on the Hatch-Aiken amendment will be of interest:

"MR. MORSE. I want to say to the Senator from New Mexico that I wish to commend him for the position which he has taken on the Taft-Hartley bill, and in regard to this particular amendment.

"MR. HATCH. I am sure the Senator restricts his commendation to what I have said on this particular amendment.

"MR. MORSE. I am about to do that by this sentence. I think it is commendable of the Senator. I am glad to hear him and the Senator from Vermont (Mr. Aiken) support the amendment, because the points the Senator is now making were all made before a vote was taken on the bill. I think it would be much more beneficial if the Senator from New Mexico would join with us who have already offered a bill to repeal the entire act.

"MR. HATCH. Mr. President, in reply to what the Senator from Oregon has said, I made it clear in the beginning that at the time this particular question was discussed I was greatly disturbed about it. I decided that the best procedure would be to pass the bill and later correct its defects. I am still of that opinion. I am still of the opinion I entertained when I voted for the Taft-Hartley bill. I am not receding from or changing my position, but I do think this is a matter which ought to be corrected."<sup>7</sup>

However, it is to be noted that no action yet has been taken on the Hatch-Aiken proposed amendment or any other proposal for revision of the Taft-Hartley law. In all probability none will be taken in this session of Congress.

It is more than likely that legislative changes will not be made in the act until after the courts have passed on the major provisions of the act, or until the inevitable labor difficulties which will be accentuated by the Taft-Hartley law in time of recession or depression produce another labor legislation crisis. At least, that usually is the course of events whenever Congress in response to the political pressures of the moment adopts makeshift legislation which it knows at the time contains imperfections so serious in nature that amendments in the future are going to be needed.

However, the difficulty and the weakness with that approach is that it is always very difficult to amend and correct the imperfections of legislation once it is passed. The time to perfect legislation is before the final vote on it is taken—and there was no good reason for the Congress to adjourn in

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<sup>7</sup>93 CONG. REC. 9005 (July 14, 1947).



July 1947 without first perfecting the Taft-Hartley law in the interest of industrial peace.

The ideal way to amend the Taft-Hartley law would be to repeal it and then consider new labor legislation based on the principles of the Senate committee bill, which in the committee stage was generally known as the Morse-Ives bill.

It is interesting to note that some of the members of the Senate committee who fought hard in committee for the Morse-Ives bill, and who helped vote down in committee some of the amendments which later were made a part of the Taft-Hartley law, joined in supporting the Taft-Hartley law on the floor of the Senate even though the Senate amendments and the more than 30 procedural changes introduced into the bill at the conference committee level produced fundamental changes in the theory of the bill.

The bill which was reported out of the Senate committee, and which during the committee stage was known as the Morse-Ives bill, placed its major procedural emphasis upon the administrative law approach to adjudicating labor disputes. For the most part it sought to make use of the unfair labor practice procedure of the Wagner Act by attempting to bring within the jurisdiction of the National Labor Relations Board certain labor abuses which were defined as unfair labor practices by unions.

However, the amendments to the committee bill made on the floor of the Senate and by the Senate-House conference committee report changed the bill basically from an administrative law procedure bill into a predominantly common law court action bill. It is submitted that if those members of the Senate committee who stood shoulder to shoulder during the long weeks of committee hearings and discussions on the Morse-Ives bill had continued to stand together in support of the committee bill when it reached the floor of the Senate, the Taft-Hartley law would not be the law it is today. The entire course of the legislation on the floor of the Senate would have been changed.

The retreat of some Senators from the provisions of the committee bill naturally influenced other members of the Senate and gave aid and comfort to those who sought to upset the committee bill. From the standpoint of parliamentary strategy it was important to maintain united support among those who fought so hard for the committee bill, in order to keep enough votes in the Senate to sustain a Presidential veto.

The very moment the group which was chiefly responsible for the committee bill split on the floor of the Senate, and some of them went along with Senate floor amendments to the committee bill—the principles of which

amendments they had voted against in committee—it then became clear to the Taft forces that in all probability they would be able to secure enough votes to override a veto. It was at that point that all the good work which had been done in committee in developing the committee bill was in large measure sacrificed because without enough votes in the Senate to sustain a veto there was not much which could be done to stop the Taft-Hartley forces in conference from attaining the type of bill they started out at the beginning of the session of Congress to pass.

As Professor Witte points out in his excellent article in the *Harvard Business Review*:

“Of 40 main provisions in the Senate bill, no less than 25 were materially changed in conference. The public is under the impression that the bill agreed upon in conference (which was the measure passed over the President's veto) followed the milder Senate bill rather than the more drastic House version. With the exception of the restrictions in the House bill on industry-wide and associational bargaining and a few other major provisions, however, the final act more closely resembles the House than the Senate version. As Representative Hartley put it, in presenting the conference report to the house, ‘there is more in this bill than may meet the eye.’”<sup>8</sup>

It is the view of the writer of this paper that if the members of the Senate committee, who had worked so close together and so hard over the weeks in putting through committee the committee bill in the form that it went to the floor of the Senate, had remained united solidly behind that bill on the floor of the Senate, the final legislation would much more closely have conformed to the provisions of the Senate bill than does the present Taft-Hartley law.

Thus it is important to an understanding of the labor legislation of the 80th Congress to know that the bill which was reported to the floor of the Senate on April 17, S. 1126, was a merging of the legislative proposals of several Senators. During the weeks in which the bill was being developed and written within the Senate committee it was known as the Morse-Ives bill because the major portions of the bill consisted of a consolidation of the separate bills which had been introduced in the Senate as independent pieces of legislation by Senator Irving M. Ives (R. New York), and by the writer of this paper. In other words, the Ives bills and the Morse bills came to comprise a greater part of the committee bill, but when once adopted

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<sup>8</sup>Witte, *Labor Management Relations Under the Taft-Hartley Act*, 25 HARV. BUS. REV. 554, 556 (1947).

by the committee and introduced on the floor of the Senate by Senator Taft, as chairman, became known as the Taft Senate bill, S. 1126.

It is interesting to note that in committee the major sections of the Morse-Ives bill were approved in committee by a vote of either 7 to 6 or 8 to 5. It was only after Senator Ives and the writer succeeded in holding a majority vote in committee on the major sections of our proposed legislation by the close margin of a one to three vote majority out of a 13-man committee that Senator Taft and other committee members finally agreed to vote for the committee bill in its entirety with the announcement that they would seek to amend it on the floor of the Senate. Therefore, although the vote within the committee was very close on each one of the major sections of S. 1126 the final vote on the entire bill and the vote by which the bill was reported to the floor was a vote of 11 to 2.

It is reiterated at this point that the principal changes which were made in the Senate bill 1126 by the conference committee were very significant changes in legal procedure for the handling of employer-employee relations and disputes under the Taft-Hartley bill. Those changes created many legal technicalities which will permit of great delays in handling disputes and which will stir up much litigation and great controversy between employers and workers.

It is an elementary principle in the settling of labor disputes that time is of the essence. Delays in entering into a collective bargaining agreement, in settling a workers' grievance, or in mediating or adjudicating a labor dispute always increases the danger of one or both parties resorting to economic action.

Furthermore, it should be remembered that the dominant remedy provided in so many sections of the Taft-Hartley bill is in the form of common law court actions. The record of common law courts in the field of labor relations has shown that those courts are not best suited for the settlement of labor issues. Common law court rules, legal principles and procedure have never worked well in America for adjudicating labor disputes and in my judgment never will because the issues involved are not basically legal issues which can best be adjudicated in the ordinary common law court.

The issue of whether or not the worker is getting a fair wage is not a legal issue. The issue of whether or not an employer is discriminating against his employees because of his membership in a union is not a legal issue. The question of whether or not a union should be certified for collective bargaining with an employer is not a legal question. The problem of determining whether a certain type of work falls within the jurisdiction of Union X or Y is not a legal problem.

At least 90 percent and probably more, of the multitude of questions, problems and issues which are involved in a great complex variety of labor relations problems are not even remotely connected with legal issues, but are basically social or economic issues growing out of the human relations existing between employer and workers.

There is even a great deal of loose thinking about the supposedly legal aspects of breaches of a labor contract by unions and by employers. Thus, for example, the Taft-Hartley Act provides only one remedy for a breach of a labor agreement by a union and that is a suit for damages in a common law court. It also will be possible under some provisions of the act in certain circumstances to secure an injunction against certain types of breaches of contracts by unions. However, those who place such confidence in the contract violation remedies of the Taft-Hartley law are thinking in terms of the ordinary legal contract.

However, a collective bargaining agreement is not an ordinary contract. Generally speaking the commitments in the so-called labor contracts are highly conditional and of the if-when-as-and-maybe type. Thus, in such an agreement the usual promise of the employer is that if, when and as he hires workers he will do so in accordance with certain promises and conditions which are set out in the agreement.

At the same time if one will study closely the ordinary and typical collective bargaining agreement he will find that there are many so-called escape clauses in it for the employer and it leaves him with very little legal responsibility for any monetary liability if he decides not to continue to perform under the contract. Thus, the cases are rare in which American employers suffer any monetary damages because they do not carry out the terms of a collective bargaining agreement.

Correspondingly, unions do not promise or commit themselves, in the last analysis, to very much under a collective bargaining agreement. As far as the workers are concerned they make the representations through their union that if, when and as they work they will agree to work under such terms and conditions as are set forth in the agreement. Furthermore, they can no more be made to work under such agreements, if they do not want to, than the employer can be made to hire or continue to hire them if he does not want to.

Yet, in spite of the great difference between the legal status of an ordinary contract and that of a collective bargaining agreement, many people, who are strong for the common law court action procedures of the the Taft-Hartley Act, are laboring under the false impression that differ-

ences which arise between employers and workers over a collective bargaining agreement can be settled by judges in our common law courts just as those judges settle a dispute which develops between a plaintiff and defendant over the terms of a contract involving a sale of a carload of potatoes.

The difficulty with people who have reduced their thinking on collective bargaining agreements to such simple legal analogies is that collective bargaining agreements do not involve primarily legal issues at all. One cannot read the Taft-Hartley law without recognizing that the authors and proponents of that bill are seeking to place a burden on the courts of America involving a subject matter which basically is foreign to their jurisdiction.

Out of the attempt which is being made under the Taft-Hartley law to force social and economic dynamics of employer-employee relations into the strait-jacket of court procedures and legal technicalities must come amendments to the Taft-Hartley law. The history of the American labor movement shows that both free workers and free employers have always opposed attempts to destroy the basic principle of voluntarism which must and should characterize employer-employee relationships.

Government domination and control of those employer-employee relationships which should rest upon voluntarism restrict the operation of a free economy. Anything that tends to place the government in a position of dictating the terms, the wages, the hours and conditions of employment destroys essential and legitimate rights of free workers. Likewise, government dictation of labor relations is bound to lead to a dangerous control by government of the methods of production, the quantity and quality of production, prices and practically all of the inherent rights of management.

It is doubtful if any law has been placed on the statute books in a good many years in this country which has a greater potential danger of government regimentation of our economy than is to be found in the basic principles of the Taft-Hartley law. Once a government starts to exercise the power to direct the relations which shall exist between supposedly free workers and free employers it is not many steps away from a regimented economy.

Thus, it should be said to those American employers and businessmen who in recent years have been crying out, and rightly so, about taking the government out of business, the Taft-Hartley law places the government into a meddling position, so far as American business is concerned, to a far greater degree than most of the laws against which businessmen and employers have been complaining so much.

The fact that temporarily American employers may think that the Taft-Hartley law will result in some benefits to them, because it is designed

supposedly to check labor abuses, should not cause them to ignore that great danger to American business, to be found in the inherent principles of government control and interference which characterize the Taft-Hartley law. It is suggested that American employers should recognize before too late that the Taft-Hartley law is a legislative wolf in sheep's clothing.

Week by week, more and more American employees apparently are recognizing that the procedures of the Taft-Hartley law will not be helpful to them in maintaining peaceful and profitable relations with free workers. Hence, as indicated heretofore in this paper, the American people are being treated to the spectacle of ordinarily law-abiding employers and workers entering into collusive, evasive and sub rosa agreements designed to avoid the legal technicalities and legal liabilities of the Taft-Hartley law. This trend does not raise the level of business and labor ethics and morality.

At the same time it needs to be pointed out that no one can participate in any large number of labor cases without recognizing that labor, too, is frequently guilty of serious mistakes in policy and of unfair labor practices which, if continued, are bound to boomerang against the best interests of labor so far as public opinion is concerned. In large measure they have been caused by the unfortunate jurisdictional disputes within the house of labor and by the fact that in recent years so much of the effort and energy of organized labor has been taken up with the organizing process itself that sufficient attention has not always been given to some of the economic practices of unions which do not advance the welfare of the individual worker or protect the public interest.

We did not need a Taft-Hartley law in order to correct some practices of labor which even most labor leaders' will admit in private are not in the best interests of labor itself. When organized labor once again takes stock of both its accomplishments and unsolved problems which lie ahead it should not overlook the fact that labor divided against itself was one of the primary causes for the passage of the Taft-Hartley Act. Labor cannot afford or justify ignoring it.

Another great evil of the Taft-Hartley law is the extent to which it leads us backward to government by injunction. The writer joins in the view of one of the great jurists of his home state who said in effect, "I do not know the answer to these vexatious and troublesome economic problems in the field of labor but I do know that the answer is not government by injunction."

Government by injunction for the settlement of labor disputes will never be acceptable to free workers in America. The history of the American labor movement is too replete with examples of determined action on the

part of American labor to free itself from the abuses of government by injunction to leave any doubt as to the unworkability or as to the acceptability of those provisions of the Taft-Hartley Act which seek to reestablish the practices of breaking strikes by unfair injunctions.

Likewise the provisions of the Act which create a legal situation in which one law of agency is to be applicable to the employers and another law of agency, to the disadvantage of labor, applicable to unions cannot be reconciled with fair play or common justice. Thus, the bill has been loaded with provisions which make it a Pandora's box of vexatious litigation that can and will harass and weaken unions.

Under the bill as amended every organizational drive by unions, every effort to achieve collective bargaining, and every strike can be met and defeated by destructive lawsuits in the courts, and hundreds of unfair labor practice charges by malcontent employees before the Board. It cannot be emphasized too strongly that any legislation that invites and encourages litigation over labor relations is not going to solve our problems of labor unrest or be conducive to harmonious relations between employers and employees.

Under the amended definition of the term "agent," a labor organization might be subject to civil suits and unfair labor practice charges because of the misconduct of any steward or organizer in the plant, even though the union had not authorized or ratified the acts in question. The whole body of law built up around the Norris-LaGuardia Act to protect unions against such destructive lawsuits is threatened.

Because of the terrific abuses to which unscrupulous employers and courts, unfriendly to unions, subjected the rights of labor by virtue of such lawsuits, the Norris-LaGuardia Act specifically provides in section 6 that labor unions, their officers and members shall not be liable for the unlawful acts of individual officers, members or agents, except upon "clear proof" of actual participation, or upon a showing of actual authorization or ratification of such acts after actual knowledge.

One has only to refer to the LaFollette investigation to recognize the techniques that anti labor employers will use in order to accomplish what may develop again under this act.

The proclivities of this bill for endless, frustrating litigation are clearly shown by the registration requirements of the Taft-Hartley law. It should be agreed that unions should be required to make public their financial statements. But the Taft-Hartley law goes far beyond a reasonable requirement for reporting union finances and union rules and regulations. It denies

to any union its right to protection from unfair practices by employers if the union has failed in some technical respects in filing all the detailed information called for by this law. No Board proceeding can possibly be wholly immune from attack for failure to disclose some one of the many details required. Employers will be quick to make such allegations because full compliance is made a condition precedent to the Board's jurisdiction for all purposes.

The tendency of the law to invite and encourage destructive and delaying lawsuits and litigation in labor relations, instead of collective bargaining, is also shown by the provision making it an unfair labor practice and subject to civil damage suits to engage in strikes and boycotts which have "as an object" certain undesirable ends, such as assignment of particular work tasks. The Senate bill provided that strikes "for such purposes" were unfair labor practices. It must be agreed that such strikes are wholly indefensible and should be stopped.

But the effect of the provision is to resurrect, with a vengeance, one of the unhappiest chapters in American industrial life. The writer refers to the days when courts were quick to enter injunctions restricting every form of employee self-help because one objective, at least, of some leaders or participants was improper. Now employers will be encouraged to enter damaging lawsuits against every kind of action by labor unions based on the same grounds. Whether these suits have merit or not, they will inevitably weaken the union's treasury, divert its energies and resources, and delay organizational work and collective bargaining.

We talk so much about the right to strike. The right to strike is, after all, no better than the status of the union treasury; because, after all, laborers strike to win a strike, and they cannot win a strike with an empty treasury.

The law opens wide the doors of opportunity to employers to bring a multiplicity of suits for the antilabor purpose of emptying the treasuries of unions by the cost of litigation.

One of the worst features of the Taft-Hartley bill, from the procedural standpoint, is the dictatorial power it vests in the General Counsel of the Board. In opposing the Taft-Hartley bill the writer had this to say on that point:

"I believe that the provisions of the amended bill, insofar as they create a statutory office of General Counsel, who is to be appointed by the President for a fixed term of years, and confer upon him final authority in respect to investigation and prosecution of charges and is-



suance of complaints, in effect establish a separation of functions which does not differ in any substantial measure from the kind of separation which the Senate rejected in 1946 when it adopted the Administrative Procedure Act. I think it contains all the vices of dispersed authority for administration that impelled the majority of the Attorney General's Committee on Administrative Procedure, the sponsors of the Administrative Procedure Act, and both Houses of Congress, to reject it last year."

It is a tremendous power that has been given to the General Counsel. On page 37 of the conference report we find this language:

"The General Counsel is to have general supervision and direction of all attorneys employed by the Board (excluding the trial examiners and the legal assistants to the individual members of the Board), and of all the officers and employees in the Board's regional offices, and is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

The writer refused to vote and never will vote to vest in any single individual any such sweeping power over the handling of labor relations cases in this country. He does not know whom we can appoint or to whom we should entrust the power to determine whether a complaint of an unfair labor practice shall be issued. One who controls the procedure of a body controls the substantive rights administered by that body. The General Counsel controls the procedural rights of every employer and every labor union in the country. Also, when it comes to the question of issuing complaints he can do it independently of the Board. The Board members can sit there and twiddle their thumbs but they cannot do anything about it, because the Congress has vested in the General Counsel that power.

Another one of the injuries to labor to be found in the Taft-Hartley law is its discriminatory provision in regard to delegating authority to the states over interstate commerce to the great disadvantage of labor in those states which pass antilabor laws. It should be remembered that the Federal government's jurisdiction over industrial relations problems is limited to its constitutional authority over interstate commerce. When it exercises that jurisdiction then it should apply whatever rules it passes on a federal basis to all workers and all employers all over the country.

It is grossly unfair of the Congress of the United States to do what it did in passing the Taft-Hartley Act, namely, permit the application of discriminatory rules in the field of interstate commerce by allowing individual

states to apply state laws of a more drastic nature to the field of interstate commerce than is applied by the Federal government.

Thus the Taft-Hartley law attempts to lay down a full and complete national policy as to closed and union shop agreements. At the same time the law provides that the national policy may be entirely disregarded and superseded by the States if they desire to impose a more restrictive policy on the same subject matter. A more pointed instance of antilabor bias could hardly be envisaged than this alleged minor change in the bill.

The jurisdiction of the National Labor Relations Board is limited to interstate commerce cases and issues. But the law now provides that we except from the national policy, as it relates to interstate commerce, national jurisdiction over these matters as they involve the closed shops and union shops, in the case of any State which passes an anticlosed shop or antiunion shop bill. The bill provides in effect that we allow to employers in those States a State policy over interstate commerce contrary to a national policy that we would apply through the National Labor Relations Board in all other States which do not enact such State legislation.

It would be difficult to point out a more flagrant example of unfair discrimination than that. When it comes to interstate commerce policies, they should be uniform throughout the Nation, and we should not have a national policy in regard to closed shops and union shops in States *X*, *Y* and *Z*, but then permit of a policy quite contrary to that policy under State laws in States *A*, *B*, and *C*.

Many employers already are protesting because it has some interesting competitive implications connected with it, too. It will be rather interesting to hear from more and more employers as they discover that in their States they are bound by the national policy but their competitors in other States have the advantage of a union-busting state policy. In due course of time this section will prove that such discriminatory practices will result in some unfair competitive factors for them in their competition with competitors in other States who are able to function under a different policy.

If we give that right to the States that are enacting legislation, much of which is highly antilabor and unfair to the legitimate rights of labor, we shall find the economic status of labor in those States gradually beaten down. The results of such discriminatory policies will affect wage scales and will play into the hands of employers who want cheaper and cheaper labor. Unorganized labor means cheap labor. It means low wages. Weak unions mean the same. State antilabor laws will return labor to the status of a commodity. Soon employers who are bound by the national policy as ap-

plied by the National Labor Relations Board will find themselves at a competitive disadvantage with employers operating in antilabor States which give to their employees the competitive advantage of antiunion legislation with its resulting low wages and cheap labor. Such a situation will result in nothing else but strife, friction, and increased labor trouble.

There are so many significant differences between the Senate Committee bill and the final Taft-Hartley bill that neither time nor space will permit of a detailed comparative analysis in this paper. A few of the more salient differences will be listed in order to rebut the argument which has been made in some of the speeches and writings of some of the proponents of the Taft-Hartley bill to the effect that it differs in only minor particulars from the Senate Committee bill.

One of the significant differences is to be found in the treatment given to the free speech issue of the two bills.

The Senate Committee Bill provided that the National Labor Relations Board shall not "base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit." (No change was made in this provision by the Senate, prior to conference.)

The conference bill and the Taft-Hartley Act as passed provided that "The expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." The significant addition, in the view of those who opposed this provision is contained in the words "shall not . . . be evidence of." The criticism is that noncoercive statements, however revealing of motive, could not be used as evidence of an unfair labor practice.

As the writer said on the floor of the Senate during debate, this is an astounding proposition.<sup>9</sup> Even in the criminal law, views, arguments and opinions are received as competent evidence of motive. Under this amendment, however, the Board and the courts must close their eyes to the plain implications of speech; and they must disregard clear and probative evidence of motive, prejudice, or bias.

Another significant difference between the Senate Committee bill and the Taft-Hartley Act is to be found in the treatment of jurisdictional disputes.

The Morse bill made it an unfair labor practice for a union or its agents to

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<sup>9</sup>93 CONG. REC. 6610 (June 5, 1947).

engage in or induce employees to engage in a strike or refusal "to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or to perform any services in the course of their employment . . . because particular work tasks of such employer or any other employer are performed by employees who are or are not members of a particular labor organization." In addition, provision was made for the National Labor Relations Board or an arbitrator appointed by it "to hear and determine" such disputes unless the parties voluntarily adjusted or arranged for the adjustment of the matter within 10 days.

In section 3 the Morse bill, S. 858, provided for compulsory arbitration of jurisdictional-disputes if the unions involved resorted to strike action and failed to settle, without delay, the dispute without a continuation of the strike. This procedure was generally recognized as the most severe that can be imposed for the settling of jurisdictional disputes but is necessary if innocent employers and the public are to be protected from family quarrels within the house of labor to which neither the employer nor the public is a party.

The Senate Committee bill provided that it was an unfair labor practice for a union or its agents to engage in or induce employees to engage in a strike or refusal "to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or to perform any services . . . for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization" unless the employer were disregarding an order or certification of the National Labor Relations Board determining the representative of the employees performing the tasks in question. The arbitration device was also adopted. (As the bill passed the Senate, a provision had been adopted, as urged by Senators Taft and Ball, making such conduct illegal and subjecting unions to damage suits on account of it.)

The Conference bill and the Taft-Hartley Act as passed adopted the provisions of the Senate bill with the following changes: (1) whereas the Senate bill stated that the action became an unfair practice if it were "for the purpose" of coercing the employer, the Act as passed provided that the action became an unfair practice if "an object thereof" was to coerce the employer in the manner described. Also, jurisdictional disputes were made illegal and the occasion for damage suits.

It is submitted that declaring jurisdictional disputes illegal cannot possibly stop them because honest differences of opinion frequently develop between labor organizations as to which union is entitled to perform a certain work.

Thus, they are bound to enter into good-faith quarrels over the respective rights of unions to perform a certain work which each union may claim on the basis of past practices and collective bargaining rights to which it is entitled. There is nothing unlawful about such disputes, and attempting to make them illegal by legislative fiat isn't going to remove the causes. What is needed for their settlement is a decision as to the rights of the disputants based on the merits of the controversy. It would be just as sensible to pass a law declaring that it would be illegal for two property owners to quarrel over their boundary line and just about as successful in preventing such boundary line disputes as it is going to be declaring jurisdictional disputes illegal under the Taft-Hartley law.

What is needed is a decision in such matters and it should be rendered by experts in the field of labor relations who know a great deal about the history and practices of work assignments among labor crafts and unions in this country over the years and who are fairly familiar with the many facets of labor problems.

Thus, it is submitted that arbitration rather than court action is the most workable solution to the jurisdictional strike problem. For that reason, both the Morse bill and the Morse-Ives committee bill contemplated appointment of an arbitrator within ten days after such a strike, whose award would be final and immediately enforceable in court, under a very narrow limitation as to scope of review, and thereby provided the speediest available procedure, consistent with due process, for the handling of the thorny problem of the jurisdictional strike.

These provisions were stricken out by the conferees on the bill, so that the Act at present provides that "the Board is empowered to hear and determine the dispute." Since the Board itself cannot hear such cases, the new rules of the Board (Secs. 203.74-203.78) now provided for 1) a hearing before a staff member of the Board on the merits of the jurisdictional dispute with 2) review of his recommendations by the Board followed by 3) efforts to obtain compliance with the determination of the Board, which if not forthcoming is followed by 4) a hearing on the unfair labor practice charge with 5) review by the Board and 6) judicial review of the entire proceeding on the wide basis now allowed by the statute. No such proceeding could be completed short of two years; the conferees by these procedural changes effectively removed an administrative remedy for the jurisdictional strike.

In the debate the writer vigorously protested these changes. He said:

"I do not have to tell the Presiding Officer that time is of the essence in the settling of labor disputes. The longer time is allowed to elapse, the more tempers and discontent are stirred up, resulting in discouragement on the part of workers and determination to resort to economic action. The procedure for settling jurisdictional disputes provided by this conference report bill will result in such delays and conflict that it will prove to be unworkable. Without a procedure that assures quick decisions little or no progress will be made in protecting employers from great losses caused by jurisdictional disputes."<sup>10</sup>

Again in connection with the treatment of secondary boycotts, the final Taft-Hartley bill changed the basic procedure for handling such disputes.

The Morse bill made the following secondary boycotts unfair labor practices: those designed to force recognition of a union when another union had been certified as bargaining agent; those intended to force recognition; and those designed to force another employer to bargain with a union. In addition, the bill authorized the National Labor Relations Board to seek a court injunction upon the filing of any unfair labor practice charge, including boycotts.

The Senate bill adopted the provisions of the Morse bill on the subject, in substance. Specifically it defined the following boycotts as unfair labor practices: those intended to force any employer to cease using or handling the goods of any other producer or manufacturer, or to force any employer to cease doing business with any other person; those designed to force any other employer to bargain with an uncertified union; and those designed to force recognition of a union when another union had been certified as bargaining agent. The bill also made it mandatory on the National Labor Relations Board to seek an injunction whenever it believed that charges alleging the foregoing unfair practices were true. (As amended on the Senate floor, boycotts were made illegal and damage suits were authorized to be brought by anyone injured.)

The Conference bill and the Taft-Hartley bill as passed in substance adopted the language of the Senate bill, as amended. However, the language used makes boycotts unfair labor practices and illegal if "an object of" the strike or boycott is to accomplish the ends prescribed, whereas the Senate bill made them unfair labor practices and illegal only if "the purpose" was to force an employer to do the enumerated things. Thus the recognized judicial test of "primary objective" is abandoned.

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<sup>10</sup>93 CONG. REC. 6610 (June 5, 1947).

Here is another technical legal change in the Taft-Hartley Act which seeks to find a common law court solution for the secondary boycotts rather than primarily through the administrative law procedures of the National Labor Relations Board of treating them basically as unfair labor practices as proposed in the Morse bill, S. 858.

Another issue which is basic to peaceful procedures for the settling of labor disputes involves violation of contract cases. One only has to read the proposals of the original Morse bill and the final Senate Committee bill in comparison with the Taft-Hartley Act to see very clearly how great are some of the differences between the Senate bill and the Taft-Hartley Act.

The Morse bill made it an unfair labor practice for a union "to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration," provided the employer were not violating the contract or refusing to comply with an order of the National Labor Relations Board. A reciprocal provision was included in the section dealing with employer unfair labor practices.

The Senate bill, as reported and passed, adopted the exact language of the Morse bill on this point. In addition, it provided that suit could be brought in federal courts for violation of contract, whether by unions or employers.

The Conference bill and Taft-Hartley bill as passed deleted the provisions making contract violations unfair labor practices. Instead, the only provision remaining is that authorizing suit to be brought in Federal courts.

Here is another fundamental difference in the Taft-Hartley law and the original Morse bill, S. 858. This section of the Taft-Hartley law eliminates entirely violation of contracts by unions as an unfair labor practice under the jurisdiction of the National Labor Relations Board. Instead it offers only one remedy for the handling of such violations, namely, suits for damages in federal courts. Earlier in this article the weaknesses and short-comings of the damage suit remedy have been set out. It is submitted that a great majority of employers would much prefer the remedy of treating breaches of contracts by unions as an unfair labor practice as provided for under the original Morse bill, than the single remedy of a suit for damages as provided in the Taft-Hartley Act.

The Morse-Ives committee bill provided for both remedies as a compromise between Senator Ives and the writer. If the compromise had been retained in the Taft-Hartley Act, the large number of employers who see the weaknesses and unworkability of the damage suit remedy would have been able to follow the remedy provided in the original Morse bill.

Perhaps one of the most far-reaching procedural changes contained in the final Taft-Hartley Act from that provided in the Senate Committee bill is to be found in a comparison of the two bills on the issue of court review and separation of functions.

The Morse bill did not alter the existing provisions relating to court review, as set out in the Wagner Act and the Administrative Procedure Act (passed by the 79th Congress and establishing uniform procedures for all Federal administrative agencies). The Procedure Act contains adequate provisions to insure that the prosecuting functions are separate from the judicial functions.

The Senate bill also preserved the court review scheme of the existing Wagner Act and the Administrative Procedure Act. The only change made was the addition of the requirement that National Labor Relations Board findings, to be conclusive on the court, must be supported "by substantial evidence on the record considered as a whole." This change merely adopted the substance of language already in the Procedure Act. No additional provisions were added relating to separation of functions.

The Conference bill and Taft-Hartley Act in material respects altered the scope of court review. The Board is required to conduct its hearings "so far as practicable . . . in accordance with the rules of evidence applicable in the district courts of the United States." Also, the Board's findings must be made "upon the preponderance of the testimony." With regard to functional separation, the Conference bill vested the investigative and prosecuting functions in an autonomous General Counsel, entirely independent of the Board.

This provision of the Taft-Hartley Act violates many principles of sound administrative law. It singles out the National Labor Relations Board, and with no justification, as an exception to the Administrative Procedure Act which was passed in 1946.

Thus in debate on the matter the writer pointed out that the Administrative Procedure Act of 1946, passed unanimously by both Houses of the Congress, had adequately protected the fairness of administrative procedures and the writer said on this point that he simply would never vote to vest in any single individual any such sweeping power over the handling of labor relations cases in this country.<sup>11</sup> No one knows where that superman is to be found. This person would control the procedural rights of every employer and every labor union in the country.

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<sup>11</sup>93 CONG. REC. 6613 (June 5, 1947).



In addition the writer pointed out that the bill, as amended in conference, carries the very serious vice that it unfairly discriminates against the Board, among all Government agencies. With respect to certain requirements, we rejected (in committee) proposals to single out the Board for special treatment and we agreed that the procedures prescribed by the recently enacted Administrative Procedure Act . . . should be left intact.

The Conference bill (now, the Taft-Hartley law) also singles out the Board, among all agencies, for special treatment as to subpoenas, the rules of evidence, and the promulgation of decisions. We cannot afford to single out in these unjustifiable ways and remove from the general law and scheme of procedures applicable to all other agencies, the one agency which is intended to protect the basic rights of labor to self-organization and collective bargaining.

Another great weakness of the Taft-Hartley Act is that it tends to place too many of our labor problems under our courts rather than in the hands of experts thoroughly trained in labor economics and the complex social and economic problems that characterize industrial relations. In the debate on this issue in the Senate the writer pointed out that it has been his consistent endeavor while this legislation has been under discussion to vest the determination to labor problems so far as is humanly possible to do so in a single organization that is expert on labor problems. . . Labor problems are complex; as complex indeed, as our entire social structure since the great mass of our people are workers. . . Close day to day contact with these problems is necessary if able persons are to keep themselves even reasonably informed.<sup>12</sup>

However, the writer pointed out also that he is confident that, despite the high regard in which he holds the district judges of the United States that they have neither the background, the desire, nor the time, to become experts in these matters. . . It is not sound legislation to disperse the authority over these problems; and to draw into the orbit of their handling a host of district attorneys or federal judges—to make impossible the development of a uniform body of precedent and decisions, harmoniously integrated with each other over the entire economy.

Another great weakness of the act is that it is going to result in greater and greater delays. One of the most important requirements to the successful solution of labor problems which can be best attained through the administrative law approach rather than through the common law court ap-

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<sup>12</sup>93 CONG. REC. 5043 (May 9, 1947).

proach, is promptness. As one of the outstanding authorities in the field of labor relations in this country, Gerhard Van Arkel, said in his speech on the Taft-Hartley Act before the Oregon State Bar convention in Portland, Oregon, September 6:

"Unless the agency can act with expedition the anthrax or the foot-and-mouth disease or the diphtheria will have infected the community. Precisely because common-law courts cannot, except in most unusual circumstances, act of their own knowledge or on their own initiative, the administrative remedy has grown to protect the public interest.

"And it is again self-evident that this must be true in labor disputes. Unless a remedy is prompt, the damage is done. Whether action can be taken promptly will depend not alone upon the language of the statute; it will also depend upon appropriations, upon the alertness of those charged with public responsibilities, upon the adequacy of staff. But, clearly, the statutory scheme should be adequate to meet problems.

"In a variety of ways, the Taft-Hartley Act burdens, rather than assists, the administrators of the law in promptly adjusting labor disputes. . . Let me cite, without discussing at length, other cumbersome procedures under this act. If a union wishes a union security clause in a contract it must 1) file affidavits of all of its officers that they are not Communists and file a mass of material concerning its internal structure and activities; 2) if it has not already done so, be designated bargaining representatives for the employees in an appropriate bargaining unit which may entail a hearing before the Board—a process frequently consuming a year's time; 3) petition the Board for a union security election and in such election procure the affirmative votes of a majority of eligible employees; 4) induce the employer to grant such a clause in the contract. Or, again, if 'a strike threatens the national health or welfare' the President appoints a Board of Inquiry, which may make no recommendations but makes a report, which the President must make public; he may also ask the Attorney General to secure an injunction against striking for sixty days, during which time the Conciliation Service attempts to adjust the dispute, failing which the Board of Inquiry again reports the facts to the President, who reports them to the Congress, while the National Labor Relations Board conducts an election to determine whether a majority of the employees wish to accept the employer's last offer of settlement.

"Only in the case of certain injunction procedures against strikes, contained in Section 10 (1) of the act, is there real expedition; elsewhere the act by over-formalization, by novel procedural requirements, by limiting the discretion of the administrators, delays rather than expedites the handling of these important subjects."

Another limitation of the Taft-Hartley Act which I wish to mention is

its technical requirements in regard to the application of the strict rules of evidence. On this point Mr. Van Arkel has stated:

"One respect in which the discretion and flexibility of the Board has been materially narrowed by the Taft-Hartley Act is in the provision requiring that the rules of evidence of the Federal district courts shall, 'so far as practicable' be observed. (Section 10 (b)). As Professor Dickinson has said . . . 'the difference between administrative tribunals and law courts in the matter of admitting evidence, the one following the more or less rigid common-law rules, the other not, is an added instance of the contrast between rule and discretion.' Without examining at length the ambiguous legislative history of this provision in the new Act, it seems designed to confine the Board to strict rules of evidence unless some good reason for departure from them appears."

In closing this paper, it is pointed out that there is a great political contest going on in this country, not so much between political parties as between political approaches to the solution of the critical domestic and international issues that confront us. To be specific the American people are going to have to decide in free election during the next few years in this country the answer to the question, "Which way, America?"

We can go in the direction of a *laissez-faire* economy being advocated by the reactionaries in both the Democratic and Republican parties and see our economy collapse again into another depression. In the last session of Congress we saw reactionaries in both parties advocate policies that would take us back to the economic patterns of the 1920's and repeat all over again the boom-and-bust business cycle. The American people must be awakened to the fact that the *laissez-faire* economy is to a large extent characterized not only by the boom-and-bust business cycle but by exploitation of the economic weak by the economic strong. Under the *laissez-faire* economy labor is treated as a commodity rather than as being made up of precious human beings entitled to all the dignities and human rights of free men and women. It is the reactionaries that produced the Taft-Hartley law. If the reactionaries have their way our economy will become a monopolistic one and our foreign policy will become one of economic isolationism. Their program will result in neither economic stability and prosperity at home nor peace abroad.